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**United States District Court**  
**Central District of California**

11 MAVERICK BANKCARD, INC.,

12 Plaintiff,

13 v.

14 NURTURE SOLUTIONS, LLC et al.,

15 Defendants.  
16

Case № 2:22-cv-02875-ODW (JPRx)

**ORDER DENYING PLAINTIFF'S**  
**MOTION FOR DEFAULT**  
**JUDGMENT [43]; AND**  
**DISMISSING COMPLAINT WITH**  
**LEAVE TO AMEND**

17 **I. INTRODUCTION**

18 Plaintiff Maverick Bankcard, Inc., moves for entry of default judgment against  
19 Defendant Marc Torre. (Mot. Default J. ("Mot."), ECF No. 43.) For the reasons  
20 discussed below, the Court **DENIES** Maverick's Motion.<sup>1</sup>

21 **II. BACKGROUND<sup>2</sup>**

22 On or about June 24, 2021, Maverick and Defendant Nurture Solutions, LLC  
23 entered into a written Merchant Account Agreement (the "Agreement"). (Compl.  
24 ¶ 12, ECF No. 1; *id.* Ex. A ("Agreement"), ECF No. 1-1.) Defendant Dane Kania  
25 signed and executed the Agreement on behalf of Nurture and also personally  
26

27  
28 <sup>1</sup> Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

<sup>2</sup> The Court derives the background facts from Maverick's Complaint. (*See* Compl., ECF No. 1.)

1 guaranteed Nurture’s obligations under the Agreement. (*Id.* ¶¶ 12–13; Agreement 3,  
 2 4.) Defendants Torre and Kania own and share a unity of interest with Nurture.  
 3 (Compl. ¶¶ 5, 14.)

4 Under the terms of the Agreement, Maverick agreed to provide credit and debit  
 5 card processing services for Nurture, and Nurture agreed to limit transaction volume,  
 6 bear responsibility for chargebacks,<sup>3</sup> and pay all amounts due to Maverick. (*Id.* ¶ 16.)  
 7 However, Nurture exceeded its transaction volume limit, incurred excessive  
 8 chargebacks, and failed to pay Maverick amounts due. (*Id.* ¶ 17.) As a result,  
 9 Maverick sustained more than \$200,000 in damages. (*Id.* ¶ 20.)

10 On April 29, 2022, Maverick filed this action alleging a single cause of action  
 11 for breach of contract against Torre, Kania, and Nurture. (*See generally* Compl.) In  
 12 the Complaint, Maverick alleges that Torre is liable for Nurture’s breach of the  
 13 Agreement because he is Nurture’s alter ego. (*Id.* ¶¶ 21, 26.)

14 Maverick served the Complaint on Torre, and Torre returned a waiver of  
 15 service acknowledging receipt. (Waiver Serv., ECF No. 23.) However, Torre did not  
 16 timely answer or respond to Maverick’s Complaint. Accordingly, on Maverick’s  
 17 request, the Clerk entered Torre’s default on August 3, 2022. (Req. Default, ECF  
 18 No. 27; Default, ECF No. 28.)

19 On June 21, 2023, Maverick notified the Court that Maverick, Nurture, and  
 20 Kania had reached an agreement. As such, the Court granted Maverick’s request to  
 21 dismiss Nurture and Kania. (Min. Order Dismissal, ECF No. 42.) Following the  
 22 dismissal, Torre is the only Defendant remaining in this action. (*See id.*) Thus,  
 23 Maverick now moves for entry of default judgment against Torre. (Mot.)

### 24 III. LEGAL STANDARD

25 Federal Rule of Civil Procedure (“Rule”) 55(b) authorizes a district court to  
 26 grant default judgment after the Clerk enters default under Rule 55(a). However,  
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28 <sup>3</sup> A “chargeback” results when a merchant accepts a credit card payment that is later disputed by the  
 credit card holder. (Decl. Benjamin Grier ISO Mot. (“Grier Decl.”) ¶ 14, ECF No. 43-2.)

1 before a court can enter a default judgment against a defendant, the plaintiff must  
 2 satisfy the procedural requirements in Rules 54(c) and 55, and Central District Civil  
 3 Local Rules 55-1 and 55-2. Even when these procedural requirements are satisfied,  
 4 “[a] defendant’s default does not automatically entitle the plaintiff to a court-ordered  
 5 judgment.” *PepsiCo, Inc., v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1174 (C.D. Cal.  
 6 2002) (citing *Draper v. Coombs*, 792 F.2d 915, 924–25 (9th Cir. 1986)). Instead,  
 7 “[t]he district court’s decision whether to enter a default judgment is a discretionary  
 8 one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Generally, after the  
 9 Clerk enters a default, the defendant’s liability is conclusively established, and the  
 10 well-pleaded factual allegations in the plaintiff’s complaint, except those pertaining to  
 11 the amount of damages, “will be taken as true.” *TeleVideo Sys., Inc. v. Heidenthal*,  
 12 826 F.2d 915, 917–18 (9th Cir. 1987) (per curiam).

#### 13 IV. DISCUSSION

14 Default judgment is not appropriate here because, at a minimum, Maverick fails  
 15 to: establish the Court may exercise personal jurisdiction over Torre; show the  
 16 Servicemembers Civil Relief Act does not apply; or state a claim against Torre.

##### 17 A. Jurisdictional Deficiencies

18 Maverick fails to establish that the Court may exercise personal jurisdiction  
 19 over Torre.

20 “In most circumstances, a defect in personal jurisdiction is a defense that may  
 21 be asserted or waived by a party.” *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999).  
 22 However, when a court considers “whether to enter a default judgment, it may dismiss  
 23 an action *sua sponte* for lack of personal jurisdiction.” *Id.*; see also *Zheng v. Li*,  
 24 No. 2:18-cv-8387-PA (JEMx), 2019 WL 1670751, at \*2 (C.D. Cal. Mar. 1, 2019)  
 25 (“[B]efore entering a default judgment, a court must consider whether it has personal  
 26 jurisdiction over the defaulting defendant . . .”).

27 Consistent with due process, a court may exercise personal jurisdiction over a  
 28 defendant if they “have certain minimum contacts with [the forum state] such that the

1 maintenance of the suit does not offend ‘traditional notions of fair play and substantial  
2 justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v.*  
3 *Meyer*, 311 U.S. 457, 463 (1940)); *Glencore Grain Rotterdam B.V. v. Shinvath Rai*  
4 *Hanarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002). A non-resident defendant may be  
5 subject to either general or specific personal jurisdiction. *Fed. Deposit Ins. Corp. v.*  
6 *British-Am. Ins. Co.*, 828 F.2d 1439, 1442 (9th Cir. 1987).

7 General jurisdiction applies where a defendant’s activities in the state are  
8 “substantial” or “continuous and systematic.” *Sher v. Johnson*, 911 F.2d 1357, 1361  
9 (9th Cir. 1990). For specific jurisdiction, the Ninth Circuit applies a three-prong test  
10 to determine whether a defendant’s contacts with the forum state are sufficient to  
11 render the exercise of specific jurisdiction reasonable: (a) the nonresident defendant  
12 purposefully directs activities or consummates some transaction with the forum-state,  
13 or performs some act by which they personally avail themselves of the privilege of  
14 conducting activities in that forum; (b) the claim arises out of or relates to the  
15 defendant’s forum-related activities; and (c) the exercise of jurisdiction comports with  
16 fair play and substantial justice, *i.e.*, it is reasonable. *Schwarzenegger v. Fred Martin*  
17 *Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). The party asserting jurisdiction, here  
18 Maverick, bears the burden of satisfying the first two prongs of this test. *Id.*

19 Under the first prong’s purposeful availment test, in contract cases like this,  
20 courts look to whether the defendant took actions “such as executing or performing a  
21 contract” demonstrating that it “purposefully avail[ed] [it]self of the privilege of  
22 conducting activities in the forum, thereby invoking the benefits and protections of its  
23 laws.” *Id.* That a defendant entered into a contract with a forum resident is not  
24 sufficient, alone, to establish purposeful availment. *See Burger King Corp. v.*  
25 *Rudzewicz*, 471 U.S. 462, 478 (1985). Rather, to have purposefully availed itself of  
26 the privilege of doing business in the forum, a defendant must have “performed some  
27 type of affirmative conduct which allows or promotes the transaction of business  
28 within the forum state.” *Sher*, 911 F.2d at 1362.

1 The plaintiff bears the burden of demonstrating that the exercise of personal  
2 jurisdiction is proper. *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir.  
3 1995). The plaintiff cannot “simply rest on the bare allegations of its complaint,” and  
4 although well-pleaded allegations are taken as true, *Schwarzenegger*, 374 F.3d at 800,  
5 “bare bones assertions of minimum contacts with the forum or legal conclusions  
6 unsupported by specific factual allegations will not satisfy a plaintiff’s pleading  
7 burden,” *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (internal quotation  
8 marks omitted).

9 First, Maverick does not allege facts establishing that Torre’s citizenship or  
10 waiver of service subject him to general jurisdiction in California. Maverick alleges  
11 only that Torre’s residence is unknown, (Compl. ¶ 3), and the record reflects that  
12 Torre is a resident and citizen of Utah, (*see* Decl. Trevor R. Witt ISO OSC Resp. ¶ 8,  
13 ECF No. 12 (attesting that Torre resides in Utah); Waiver Serv. (reflecting that Torre  
14 executed the waiver of service in Utah).) Thus, Torre is not subject to general  
15 personal jurisdiction as a resident or citizen of California. Additionally, Torre’s  
16 waiver of service alone does not establish this Court’s personal jurisdiction over him.  
17 *C.f.* Fed. R. Civ. P. 4(k)(1)(A) (providing that a waiver of service establishes personal  
18 jurisdiction over a defendant “who is subject to the jurisdiction of a court of general  
19 jurisdiction in the state where the district court is located.”).

20 Next, Maverick has not alleged any facts to satisfy the specific jurisdiction  
21 purposeful availment test. Maverick alleges that Torre, Kania, and Nurture  
22 “transacted sufficient business with the State of California such that it is proper for a  
23 California-situated court to exercise both specific and general personal jurisdiction  
24 over each of them.” (Compl. ¶ 11.) This is a legal conclusion, unsupported by any  
25 factual allegations, and does not suffice to establish any form of personal jurisdiction  
26 over Torre. *See Swartz*, 476 F.3d at 766. The only apparent connection to California  
27 in this case is Maverick’s location. (*See* Compl. ¶ 1.) But Maverick’s location in  
28 California is also insufficient to establish personal jurisdiction over Torre. *See Axiom*

1 *Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1065, 1068 (9th Cir. 2017) (“[T]he  
 2 minimum contacts analysis examines ‘the defendant’s contacts with the forum State  
 3 itself, not the defendant’s contacts with persons who reside there.’” (quoting *Walden*  
 4 *v. Fiore*, 571 U.S. 277, 285 (2014))).

5 As Maverick fails to establish personal jurisdiction over Torre, the Court  
 6 **DENIES** the Motion for Default Judgment on this basis.

7 **B. Procedural Deficiencies**

8 Additionally, Maverick fails to satisfy the procedural requirements for entry of  
 9 default judgment.

10 Local Rule 55-1 requires that the movant establish: (1) when and against which  
 11 party default was entered; (2) the pleading to which default was entered; (3) whether  
 12 the defaulting party is a minor or incompetent person; (4) that the Servicemembers  
 13 Civil Relief Act (“SCRA”) does not apply; and (5) that the defaulting party was  
 14 properly served with notice if required under Rule 55(b)(2).

15 Regarding the fourth requirement, the SCRA protects servicemembers from  
 16 default judgments entered in their absence while they are in military service. *See*  
 17 50 U.S.C. § 3931(b); C.D. Cal. L.R. 55-1. Accordingly, a plaintiff seeking entry of  
 18 default judgment must file an affidavit stating whether the SCRA applies, i.e., whether  
 19 the defendant is in military service. 50 U.S.C. § 3931(b)(1); C.D. Cal. L.R. 55-1(d).  
 20 If the court is “unable to determine whether the defendant is in military service” based  
 21 on the affidavits submitted, the court “may require the plaintiff to file a bond in an  
 22 amount approved by the court” before entering judgment. 50 U.S.C. §3931(b)(3) (“If  
 23 the defendant is later found to be in military service, the bond shall be available to  
 24 indemnify the defendant . . . should the judgment be set aside in whole or in part.”).

25 Maverick submits an affidavit stating it is “unable to determine whether  
 26 Defendant Torre is a member of the U.S. military currently on active duty, or whether  
 27 he is a U.S. citizen serving in the military of a U.S. ally in the prosecution of a war or  
 28 military action.” (Decl. Trevor R. Witt ISO Mot. (“Witt Decl.”))¶ 12, ECF No. 43-3.)

1 Maverick requests that the Court make this determination for it. (*See* Mot. 5.) Based  
 2 on the affidavits Maverick submits, the Court is unable to determine whether Torre is  
 3 in military service such that the SCRA applies. Accordingly, before the Court will  
 4 consider entry of default judgment against Torre, Maverick must establish either  
 5 (i) that the SCRA does not apply, or (ii) that Maverick is willing and able to post a  
 6 bond equal to the amount of damages it seeks from Torre.

7 At this time, as Maverick fails to establish that the SCRA does not apply, the  
 8 Court **DENIES** the Motion on this basis.

### 9 **C. Pleading Deficiencies**

10 Finally, Maverick fails to state a claim against Torre in the Complaint.

11 In considering whether entry of default judgment is warranted, courts consider  
 12 the “*Eitel* factors”: (1) the possibility of prejudice to plaintiff; (2) the merits of  
 13 plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of  
 14 money at stake; (5) the possibility of a material factual dispute; (6) whether the default  
 15 was due to excusable neglect, and (7) the strong policy favoring decisions on the  
 16 merits. *See Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). “Of all the *Eitel*  
 17 factors, courts often consider the second and third factors to be the most important.”  
 18 *Viet. Reform Party v. Viet Tan-Viet. Reform Party*, 416 F. Supp. 3d 948, 962 (N.D. Cal.  
 19 2019) (internal quotation marks omitted).

20 The second and third *Eitel* factors require a plaintiff to “state a claim on which  
 21 the [plaintiff] may recover.” *PepsiCo*, 238 F. Supp. 2d at 1175 (alteration in original).  
 22 Although well-pleaded allegations are established as true on default, “necessary facts  
 23 not contained in the pleadings, and claims which are legally insufficient, are not  
 24 established by default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267  
 25 (9th Cir. 1992).

26 Maverick asserts a single cause of action against all Defendants for breach of  
 27 contract. (Compl. ¶¶ 23–29.) Under California law,<sup>4</sup> to state a claim for breach of

28 <sup>4</sup> California law governs the Agreement. (Griefer Decl. Ex. 1 at 10, ¶ 38, ECF No. 43-2.)



1 contract, a plaintiff must establish the existence of a valid contract, the plaintiff's  
2 performance or excuse for nonperformance, defendant's breach, and resulting  
3 damages to the plaintiff. *See Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821  
4 (2011). Here, Maverick alleges that Kania executed the Agreement on behalf of  
5 Nurture, Maverick performed, Nurture breached the Agreement by failing to limit  
6 transactions and failing to pay Maverick amounts due, and that Maverick has been  
7 damaged as a result of Nurture's breach. (Compl. ¶¶ 16–20.) These allegations may  
8 state a claim for breach of contract against *Nurture*, but they do not state a claim  
9 against *Torre*.

10 Rather than argue Torre is directly liable, Maverick alleges that Torre is liable  
11 for Nurture's breach of the Agreement because Torre is Nurture's alter ego. (Compl.  
12 ¶¶ 15, 21, 26.) A corporate entity may be found to be the alter ego of its members or  
13 shareholders, which allows a plaintiff to hold the members liable for the entity's  
14 harms. *Watson v. Commonwealth Ins. Co. of N.Y.*, 8 Cal. 2d 61, 68 (1936). To state a  
15 claim based on alter ego liability, a plaintiff must establish that (1) there is "such unity  
16 of interest and ownership that the separate personalities of the corporation and the  
17 individual no longer exist," and (2) the failure to disregard the corporation would  
18 result in injustice. *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d  
19 825, 837 (1962).

20 In support of alter ego liability against Torre, Maverick alleges "there existed a  
21 unity of interest and ownership between" Nurture, Torre, and Kania, "such that any  
22 individuality or separateness between them has ceased." (*Id.* ¶ 14.) Maverick  
23 continues that "the activities and business of [Nurture] were carried out without the  
24 holding of directors' or shareholders' meetings, and/or without maintaining records or  
25 minutes of any such proceedings." (*Id.*) Lastly, Maverick alleges that Torre and  
26 Kania co-mingled their assets with Nurture and used Nurture to enter into contracts  
27 for their own personal benefit. (*Id.*)  
28





1 In light of the lack of personal jurisdiction and Maverick's failure to state a  
2 well-pleaded claim against Torre, the Court *sua sponte* **DISMISSES** the Complaint  
3 with leave to amend limited to curing the above-identified deficiencies. Amendments  
4 beyond the scope of this specified leave will not be accepted. Accordingly, the Court  
5 **VACATES** the default entered against Torre. (ECF No. 28.)

6 If Maverick elects to file an amended complaint, it must do so no later than  
7 **fourteen days** after the date of this Order. Maverick must serve the amended  
8 complaint on Torre within **twenty-one days** of filing it with the Court and file a proof  
9 of service with the Court immediately thereafter. If Maverick fails to timely file an  
10 amended complaint, the Court will close this case.

11  
12 **IT IS SO ORDERED.**

13  
14 December 11, 2023

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18 **OTIS D. WRIGHT, II**  
19 **UNITED STATES DISTRICT JUDGE**  
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